No. 13695

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Appellant,

vs.

LEE GNAN LUNG, by his next friend Lee Kut,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
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JURISDICTION

Jurisdiction of the district court and this court is conferred by Sec. 903, Title 8, U.S.C.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court declaring appellee, a native born Chinese 27 years of age who has never been in the United States, to be a citizen of the United States by reason of being the son of an American citizen. The action was commenced against Dean Acheson, but John Foster Dulles has been substituted in this court.

Appellee alleges in his complaint, which was filed in the district court by Lee Kut as his next friend *while appellee was still in China*, that he is a citizen of the United States, and brings this suit through his father Lee Kut also a citizen of the United States and a resident of King County, State of Washington; that he was born at Wah Lum Village, China on September 15, 1926. (R. 3, 4)

It is also alleged that appellee is a citizen of the United States under Section 1993 of the Revised Statutes (8 U.S.C. 6) as amended by Section 201(g) of the Nationality Act of 1940, 8 U.S.C. 601(a); that the alleged father Lee Kut is also a citizen of the United States and his citizenship has been recognized and conceded by the Immigration Service at the Port of Seattle, on several occasions; that the permanent residence of Lee Kut is in Seattle, where he is engaged in the laundry business, and that appellee has

and claims his permanent residence in the City of Seattle *(although he has never at any time been in this country)*.

It is further alleged that Lee Kut was legally married to Lew Shee on November 28, 1925 and that appellee was the lawful issue of said marriage; that in February 1951 Lee Kut caused to be prepared an identification affidavit stating his relationship to appellee and all of the particulars concerning him for the purpose of securing from the American Consul General in Hong Kong a travel document to enable appellee to travel to the United States, which document it is alleged was filed with said American Consul, but that the *Consul failed to and neglected to take any action thereon;* that on October 11, 1951 the Consul wrote a letter, stating appellee had been interviewed at the office of the American Consul but *appellee had not presented sufficient evidence to enable the Consul to issue him a final document and that it was indefinite when any travel document would be issued* because *there were approximately 1800 cases ahead of appellee's application;* that there existed no good reason for such delay because appellee had submitted adequate and competent evidence of his citizenship and right to come to the United States and that the *American Consul*, upon information and belief of appellee, *had no intention of issuing appellee*

a travel document; that a year was an unreasonable time; that appellee's right to a travel document could be determined on a basis of the affidavit submitted; that the action of the American Consul has been referred or appealed to the Secretary of State upon information and belief of appellee. It is further alleged that appellee was informed and believed that *no action would be taken upon his application,* and that if *any action is taken, it would be unfavorable.*

The prayer was that an order be issued directed to the defendant (appellant) to issue a travel document; that a decree be entered adjudging appellee to be a citizen of the United States. (R. 7)

On March 21, 1952 appellee filed a motion for an order to show cause which was issued directing appellant to show cause, April 28, 1952 why he should not be required to issue such a travel document.

To this order to show cause appellant, through the United States Attorney, filed a return in which a telegram from the Attorney General was set out as follows:

> "Lituated April 4, 1952, re *Lee Gnan Lung v. Acheson.* State Department advised us plaintiff has not appealed to Secretary for certificate, therefore administrative remedies have not been exhausted."

The return further set forth a letter from the Secre-

tary of State reading in part:

> "* * * case *Lee Gnan Lung* (civil action 3010) * * * application being processed by Consul General in Hong Kong at present time."

The return further set forth:

> "That because of the pendency of plaintiff's application before Consul General, Hong Kong, and there being no refusal to process the same, the action is premature, and there having been no appeal to the Secretary of State, plaintiff has not exhausted his administrative remedy."

The prayer was that the action be dismissed and the rule to show cause discharged. (R. 12)

After the hearing and on May 5, 1952 the court entered an order directing appellant to issue a travel document. (R. 13-14)

On July 2, 1952, appellant filed a motion for a stay of the order directing the issuance of the travel document supported by the affidavit of an Assistant United States Attorney, and thereafter and on July 14, 1952 a motion was filed by appellee seeking an order to show cause why the Secretary should not be adjudged in contempt for his refusal to issue said travel order. (R. 21) Appellant's motion for a stay was denied July 14, 1952. (R. 22)

Appellee's counsel thereafter desired to proceed to the determination of the issue presented in the

absence of appellee with the understanding that the defense would constitute a general denial without a formal pleading and the defense of lack of exhaustion of administrative remedy. The matter was heard before the court October 22, 1952, at which time witnesses on behalf of appellee were called and testified, to-wit: Lam Gnan, alleged grandmother, Lee Yik, alleged uncle, Lee Gnan, alleged nephew, Lee Hing, Toy Shee, alleged aunt of appellant and the wife of Lee Yik, and Lee Kut, the alleged father.

Not one witness testified to anything but heresay, as will be hereafter set out.

THE PROCEEDINGS

Before setting out the evidence adduced and in relation to the issues, the following is quoted from the record: (R. 32)

MR. MERGES:

> The background of this matter is — a brief summary may be helpful to the court.
>
> The background of this matter is that the applicant's father in this case is a resident of Seattle. He operates a wholesale laundry business here with his brother called the Star Laundry. They do laundry in wholesale quantities for various hotels in the city.
>
> As a result of a trip to China in 1925 there was born to him a son named Lee Gnan Lung.
>
> The immigration authorities have written a

letter, or summary, of the investigation of the file of the applicant's father, which we will ask to be read into the record, in order to save time, in which the immigration people advise that the *applicant's father was in China in time to make his paternity of this boy possible,* and also this file shows that upon examination by the immigration officers upon his return to the United States from China — *the boy was born after he arrived here,* but, upon a subsequent examination in some immigration proceedings, I don't remember which it was he mentioned this boy.

The affidavit was filed by Lee Kut, who is the father, in March, 1951.

* * *

The Government made a motion in this case. We secured a show cause order and the court entered an order directing issuance of a travel document.

The Government resisted that rather strenuously and briefs were filed and the travel document was never issued.

The Government then, in July of this year, made a motion to stay the order directing issuance of the travel document which was denied on the 14th of July, 1952.

We then made a motion to hold the defendant, Dean Acheson, in *contempt of court* for his failure to comply with the order of the court, and the court indicated at first that he felt that the defendant was in contempt of court and later the court indicated that he had deviated from the decision and felt serious doubts as to whether or not he had jurisdiction to hold the defendant in contempt of court, and direct him to issue a travel document.

THE COURT:

That was probably in accordance with Judge Goodman's decision. (R. 34)

* * *

MR. MERGES:

The question in this case is that the consul has just not acted one way or another about it and this affidavit was filed back in February, 1951. (R. 36)

MR. BELCHER:

I might say, if your honor please, that the the position of the Department is that this action is somewhat premature in view of the fact that *one of the essential allegations in the complaint is that they have been denied the right or privilege of an American citizen.*

The status of the nationality of the applicant has not yet been determined by the consul. (R. 38)

* * *

THE COURT:

That was denied was it not?

The motion to dismiss was denied?

MR. BELCHER:

I take it that it was, but no formal order was entered.

MR. MERGES:

There was an order entered July 10, 1952. (R. 39)

THE EVIDENCE

Lee Kut, the alleged father, testified that he was married to Lew Shee according to the Chinese custom, that as the lawful issue of that marriage there were three children born to the parties. (R. 43)

Q. When was the boy, who is the subject of this action, Lee Gnan Lung born?

A. He was born in 1926.

Q. When did you make a trip to China?

A. I made that trip to China in 1925.

Q. And you were still married to Lew Shee at that time?

A. Yes, sir.

Q. And your boy, Lee Gnan Lung, was born as a result of that trip: is that correct?

A. That is correct. (R. 43)

(Lee Kut returned from China before the boy was born and was in the United States when it is alleged the child, Lee Gnan Lung was born.)

On cross-examination Lee Kut testified:

Q. You say you are anxious to have the boy with you?

A. Yes, sir.

Q. How long have you been anxious to have him with you?

A. *Well, since China was occupied by the Communists.*

Q. Well, he is — How old is he now?

A. He is twenty-seven (27) this year.

Q. But when did he finish ordinary school?

A. Oh, ordinary school, in China that would require about six (6) to nine (9) years, that would be when he was around fifteen (15). (R. 52)

Q. You made no effort to get him here after he had completed school?

A. No. *I made no effort because his grandfather was born then (there); his grandfather was alive then.*

Q. And how long has his grandfather been dead?

A. His grandfather died in 1941. (R. 52)

Q. *You were not present in China at the time this boy was born?*

A. No sir.

Q. So what you know about his birth somebody told you?

A. No. Oh, the birth, someone told me, yes.

Q. Yes, and what is your means of identification of him?

A. *Of my means of identification of him is when I made that trip in 1934.* His means of identity, *why I wouldn't say he looks exactly like me, but there are a few resemblances that he looks like me.* (R. 53)

Lam Gnan, the alleged grandmother of appellee was called and (R. 56) through Lim Lee, an interpreter, testified that she came to the United States from China in 1913, and went back to China eight

years later (1921); stayed in China five or six months; and went back to China in 1928. *(She was not in China, when the alleged son, the appellee, was born.)* She is the mother of Lee Kut, the alleged father of appellee. She testified that she lived on one side of the house occupied by the wife of Lee Kut and Lee Kut's wife lived on the other side *with a two year old boy named Lee Gnan Lung* (R. 59). She remained in China several months. She identified a picture (Ex. 3) of Lee Gnan Lung.

On cross-examination she testified:

Q. How do you know he (Lee Gnan Lung) is your grandson?

A. Because she has seen him several times.

Q. Who told you? Did somebody tell you that he was your grandson?

A. (by interpreter) She says she recognizes him.

Q. How could you? How do you recognize him?

A. (by interpreter) She has seen him several times in the past when he was a baby she saw him then on several trips she saw him. (R. 61)

Q. *Were you there when he was born?*

A. (by interpreter) *She was not.*

Q. Do you know when he was born?

A. September, 15th of September.

Q. What year?

A. 1926.

Q. How do you know that?

A. Mrs. Lee Kut sent her a letter and told her about it.

Q. Have you got that letter?

A. (by interpreter) No, she hasn't. She said she read the letter and kept it a while and then it disappeared among her belongings.

Q. Do you know whether or not in China it is a custom for the Chinese people to take other children into their homes?

A. (by interpreter) Yes, she does, she knows.

Q. And is that the custom?

A. Yes. (R. 62)

Lee Yick, the brother of Lee Kut (and the alleged uncle of Lee Gnan Lung) testified as follows:

Q. Did you make a trip to China in 1928?

A. Yes, sir.

Q. When you went to China, did you go to your brother Lee Kut's house?

A. Yes, sir.

Q. What was the purpose of your going there?

A. At that time my father and my mother and I went back to China and we visited my brother's wife and *my brother's wife told me that Lee Gnan Lung is my brother's son.* (R. 68)

Q. And then you went back to China in 1928 for the purpose of getting married?

A. Yes, sir.

Q. How long did you remain in China?

A. About nine (9) months.

The witness made another trip to China, staying nine months again in 1934 and *again stayed nine months* again in 1939 and by coincidence then *stayed nine months again*, on each of which trips he saw Lee Gnan Lung. (R. 70)

On cross-examination:

Q. *You were not in China at the time — you were not in China on February 15, 1926 were you?*

A. No, sir.

Q. Did you ever see any birth certificates?

A. No, sir.

Q. (continuing) showing the birth of Lee Gnan Lung?

A. No, sir. (R. 71)

Q. So that the only knowledge you have as to when he was born is this statement made to you by somebody else; is that correct?

A. What statement?

Q. Somebody told you that he was?

A. Yes, my brother's wife told me.

Q. And that is the only information you have on the subject.

A. Yes. (R. 71)

A photograph was shown the witness and he identified appellee in the photograph.

Lee Ngan, the son of Lee Yik, who came to this country from China in 1940 was called and testified. (R. 74)

Q. Prior to the time you landed here in 1940, where did you live?

A. In China, sir.

He testified that he lived with his mother in his father's house.

Q. Now, your uncle, Lee Kut, did he have any children?

A. Yes sir. (R. 75)

Q. Did he have a son named Lee Gnan?

A. Yes, sir.

Q. Did you live in the same village with that son from the time you were born?

A. Yes, sir.

The witness was shown a photograph and identified Lee Gnan Lung. (Ex. 4) The small boy in the middle of the picture was identified as the witness.

Q. How old were you then?

A. Oh, six (6) I believe.

Q. How old are you now?

A. Now, I am eighteen (18). (R. 75)

On cross-examination, this witness testified:

Q. And who told you that he was your — re-related to you in any way?

A. My grandmother, my uncle, my father and my mother and the villagers. (R. 77)

Q. And that is the extent of your knowledge?

A. Also my grandfather.

Q. Now, in 1940, you were approximately six (6) years old?

A. Yes, sir.

Q. When was it that you say your grandfather and your mother and your relatives told you that this boy was related to you?

A. As soon as I was capable of understanding.

Q. How long would that be, do you think, TW0 (2) OR THREE (3) years old?

A. Yes.

Q. Now, the only thing you know about the alleged relationship between the plaintiff in this case and you is what somebody told you?

A. No.

Q. How else do you know?

A. *That Lee Gnan Lung is my cousin because when I was a small boy he used to play with me.* (R. 77)

Lee Hing (through an interpreter) testified as follows: (R. 80)

Q. How old are you?

A. Seventy (70).

Q. Did you have occasion to visit China in the last few years?

A. (by interpreter) Since 1939 he hasn't been back.

Q. Did you make a trip to China in 1939?

A. Back to States.

Q. No, did you make a trip to China in 1939?

A. (by interpreter) No, he wasn't. He is on his way back to the United States at that time.

Q. What time? Just ask him when he was last in China. Maybe we can simplify it.

A. (by interpreter) He was in China in 1934 to '39.

Q. Did you ever see any of Lee Kut's children?

A. (by interpreter) He said he have seen Mr. Lee Kut's son on several occasions.

Q. When did you see Lee Kut's son the last time?

A. About fourteen (14) years ago.

He was handed the group photograph (Ex. 4) and asked if he could recognize or identify any of the persons therein.

A. (by interpreter) He said he can recognize two (2) of those in the picture.

Q. Who are they?

A. One is Gnan, the fellow who testified before he did.

Q. Which one is he referring to when he said one is Gnan?

A. The small boy sitting on the pedestal.

Q. And who is on the extreme right?

A. In the dark clothes, Mr. Lee Gnan Lung.

Q. You weren't there when Lee Gnan Lung was born were you?

A. (by interpreter) No, he wasn't.

Q. So the only thing you know about whether or not Lee Gnan Lung is Lee Kut's son is what somebody else told him?

A. (by interpreter) He knows because his grandfather introduced him as his grandson. (R. 82)

Toy She (the wife of Lee Yik (R. 67) was called as a witness and testified. (R. 83)

She testified she was married to Lee Yik in China in 1928 and came to the United States in 1947. (R. 84)

Q. When you were married to Lee Yik, did you meet all of Lee Yik's family?

A. (by interpreter) Yes she did.

Q. And did you live in the same village with Lee Kut's family?

A. Yes.

Q. After you were married?

A. Yes.

Q. State whether or not Lee Kut had any children.

A. (by interpreter) She has one (1), Lee Gnan Lung.

Q. How long did you live in the same village with this boy?

A. (by interpreter) She says she lived in the same village with Mr. Lee Gnan Lung from the date of her marriage until her departure to the United States.

THE COURT:

Did she say when she came to this country?

THE INTERPRETER:

In the Chinese Republic, the 36th year.

MR. MERGES: That is 1948.

MR. BELCHER: 1947.

MR. MERGES: 1947.

THE COURT:

Ask her if he was there when she left?

THE INTERPRETER:

She said Mr. Gnan brought her out Hong Kong.

On cross-examination:

Q. You don't know of your own knowledge that Lee Gnan Lung is the son of Lee Kut?

A. (by interpreter) She said that she knows. She said she know that *not as her knowledge is concerned*, but she knows he is her son.

Q. How does she know that?

A. She said Mrs. Lee Kut told her. (R. 85)

MR. MERGES:

That is our case, if your honor please.

THE COURT (addressing government counsel) You have no proof?

MR. BELCHER:

No, your honor. I think the evidence is wholly insufficient to grant the relief prayed for. It is based entirely on hearsay. No direct evidence at all of the birth of this child and, further than that, it seems strange that no effort was made to bring this alleged child to the United States until he reached the age of 27 years, although there was plenty of opportunity to do so.

THE COURT:

I might ask you this, Mr. Belcher: What testimony do you think there would be to establish the birth?

MR. BELCHER:

I think, if your honor please, that this is one case in which the blood grouping test would be proof positive, and before this case is determined by your honor, if in the event of your denial of the motion to dismiss because of the lack of sufficient evidence, that the court in this case should order a blood grouping test, particularly in view of the fact that one of the witnesses testified here it is the Chinese custom to adopt and take in children. (R. 86-87)

THE COURT:

It is the custom in this country to do that, too.

MR. BELCHER:

I realize that. I say, *there is no direct evidence* here at all that this man is the father of this child. *It is all hearsay, every bit of it.*

THE COURT:

Isn't that true of most people except where you have birth certificates?

MR. BELCHER:

No. I think, as your honor knows, in some of these Chinese cases they have introduced birth certificates.

THE COURT:

What if they haven't any?

MR. BELCHER:

The burden is upon them, not us.

THE COURT:

The court thinks it is proved and grants the

petition. (R. 87)

MR. BELCHER:

And the court refuses to order—

THE COURT:

(interposing) I see no occasion to order it unless you have *some other showing than guess work.* I don't think it is sufficient to say lack of a birth certificate is proof of your position. There is nothing else you have offered at all.

MR. BELCHER:

Well, there is no showing here, if your honor please, and there has been no positive proof here, of citizenship, and the burden is entirely on the petitioner.

THE COURT:

I grant that, but the statute provides for this action. What kind of proof is the court supposed to have? The court realizes that there can be situations where a person is an imposter and not a true son, but at the same time is the court to listen to witnesses and assume that they are not telling the truth?

Maybe the court is under some misapprehension and maybe the statute should be changed, but when an action like this is filed and these people get on the stand and they are citizens and they take the oath and presumption is that they understand then they testify, *granted it is hearsay,* but there are many, many people, most of the people in the world whose birth must be proved by hearsay, and that type of hearsay testimony is acceptable.

MR. BELCHER:

The father and mother are the only two people that could testify to that.

THE COURT:

The father can't testify if he isn't there and the mother is dead. The fact that the mother died — the court doesn't wish to get into a debate, but it appears to the court that if the mother is dead — and there is no other person who can testify of personal knowledge, whether it be a doctor or midwife, whoever it may be, you say that that isn't sufficient showing; or, on the part of the Government in a case of this character, merely to show that there is no one else who can say that they know that the son—

MR. BELCHER:

Well, I would like to have the record show that I ask the court, under Rule 35, for a blood test, a blood grouping test, which would be proof positive of lack of parentage, and that is our defense here — that there is no identification. This would be a very good case to have the Court of Appeals determine. (R. 89)

THE COURT:

I think it may be. I think in regard to your last motion the record may so show. I think it is not timely *and the court will say that the testimony is not such as to warrant the court, on its own motion, to ask for that test.*

Frankly, I will say this: These cases are a problem to the court. Recognizing that situaations may present themselves where persons other than sons of citizens will contend to be such, unless the government has something more to establish that, I don't think the Court is in position to presume that these witnesses are not telling the truth. (R. 89)

MR. BELCHER:

Of course, I go on the hearsay.

A recess was taken until 2:00 p. m. Upon the reconvening of the court at 2:00 p. m. counsel presented his proposed findings, conclusions and decree.

MR. BELCHER:

Before your honor signs that, I would like to call your honor's attention to Judge Roche's decision (see appendix "A") It isn't in the advance sheets.

THE COURT:

I assume this order was entered, Mr. Belcher, upon motion and not upon conclusion of testimony of the plaintiff. (R. 90)

MR. BELCHER:

As I explained to your honor this morning, when we were discussing this matter yesterday, Mr. Merges and I, I understood that the grandmother was in China at the time of the birth of the child and would have first hand knowledge of the birth. It developed for the first time this morning that she wasn't there until two years afterwards and I made my motion at the first opportunity.

THE COURT:

Well, it would appear to me, Mr. Belcher, that the testimony given in this matter this morning, there having been no answer, *the Court recognizing that the petitioner in all these cases has the burden* of establishing *his identity*, that the proof is sufficient to establish a *prima facie case*, if not to establish conclusively *the identity*, and if the only thing that the Government would have in opposition would be possible evidence that may result from physical examination or blood grouping test, as I understand—

MR. BELCHER:

That is correct, your honor.

THE COURT:

(continuing) — that shouldn't be sufficient to warrant the court's delaying in making a finding on the evidence as adduced, recognizing that in these paternity cases, or in establishing birth, that hearsay is acceptable. (R. 90). *I haven't checked the law on it,* but it is my recollection that hearsay is acceptable, or is not subject to the ordinary objection that it is hearsay testimony, when it relates to the birth of a child. Isn't that correct?

MR. MERGES:

That is correct your honor.

MR. BELCHER:

In the ordinary case, I think that is the rule. (R. 91)

(The court missed the point — the hearsay is not as to birth, but as to *identity.)*

MR. BELCHER:

That is the purpose of the blood grouping test. *Blood grouping tests will disprove paternity* but it will not prove it.

THE COURT:

I understand that, I am not familiar with how reliable it is, but I am familiar with the theory.

MR. BELCHER:

I just thought I would call it to your attention.

THE COURT:

The record may show that you make the request but if the testimony as given this morning is not sufficient I think that the court should know about it on appeal. (R. 91)

THE FINDINGS

The court thereupon entered the following findings of fact and conclusions of law:

I.

That Lee Kut, the father of plaintiff Lee Gnan Lung, is a citizen of the United States, an honorably discharged veteran of World War II and a resident of Seattle, King County, Washington.

II.

That the defendant is the duly appointed, qualified and acting Secretary of State of the United States of America.

III.

That the plaintiff, Lee Gnan Lung, was born in China at Wah Lum Village, Hoy Shan District, on September 15, 1926, and was the lawful issue of the marriage of Lee Kut and his wife Lew Shee, who is now deceased.

IV.

That in February 1951 the plaintiff's father, Lee Kut, caused to be prepared an identification affidavit, stating his relationship to the plaintiff, and all the particulars concerning the same and that said affidavit was prepared for the purpose of securing from the American Consul at Hong Kong a travel document to enable plaintiff

to travel to the United States; that said identification affidavit was filed with the American Consul but that the American Consul failed to grant the plaintiff a travel document.

V.

That it was not possible for the plaintiff to be personally present in court by reason of the failure of the defendant to issue plaintiff a travel document to enable him to come to the United States.

VI.

That the paternal grandmother, his paternal uncle, paternal cousin and other witnesses have all testified affirmatively to the relationship in question and the court finds that Lee Gnan Lung is the *foreign born blood son of Lee Kut*, born in lawful wedlock.

From the foregoing findings of fact the court makes the following

CONCLUSIONS OF LAW

I.

That plaintiff is entitled to the entry of a decree adjudging him to be a citizen of the United States in accordance with Section 503 of the Nationality Act of 1940. (R. 24-25)

A decree was entered on October 22, 1952 in accordance with the findings and conclusion. (R. 26-27)

Notice of appeal was filed December 18, 1952. (R. 28)

ASSIGNMENT OF ERRORS

The District Court erred in the following particulars:

1. The court erred in refusing to dismiss plaintiff's complaint for lack of jurisdiction.

2. The court erred in its order directing the defendant to issue to plaintiff a travel order entitling plaintiff to travel to the United States to prosecute this action.

3. The court erred in denying defendant's motion to stay its order for travel document.

4. The court erred in denying defendant's motion for a blood grouping test.

5. The court erred in holding the evidence sufficient to establish American citizenship in plaintiff.

6. The court erred in entering a decree declaring plaintiff to be an American citizen. (R. 29)

SUMMARY OF ARGUMENT

On the first point—refusal to dismiss. This assignment is based upon two grounds.

(A) At the time of trial the American Consul at Hong Kong had not completed his investigation

and *appellee had therefore not been denied any right as an American citizen.*

(B) That until such denial had been made the district court acquired no jurisdiction.

On the second assignment, the district court was entirely without jurisdiction to direct the defendant Secretary of State to issue a travel document.

On the third assignment, the district court should have granted appellant's motion to stay its order requiring appellant to issue a travel document.

On the fourth point, there being no valid proof of identity, the court erred in denying appellant's motion for an order requiring a blood grouping test.

On the fifth assignment the court erred in holding the hearsay evidence sufficient to establish the identity of appellee *as the blood son of Lee Kut.*

On the sixth assignment, the court erred in decreeing the appellee an American citizen.

ARGUMENT AND AUTHORITIES

At the outset it must be remembered that the complaint filed herein nowhere alleges, nor does the proof show, that appellee has ever been denied any right as an American citizen. The appellee was not

present in court and not a single witness positively identified him other than by photographs taken in China and the district court never saw him.

Because he has never been denied such right the district court lacked jurisdiction of the subject matter of the action and should have either dismissed the action or abated it until the American Consul had acted.

A Certificate of Identity is a creature of the statute and may only be issued in accordance with the terms of the creating statute, and until a Certificate of Identity has been denied and an appeal from such denial has been filed with the Secretary of State in accordance with the provisions of the statute creating the Certificate of Identity as a travel document and the regulations set forth in 22 C.F.R. 50.28 the Secretary of State is without authority to authorize the Consulate General at Hong Kong to issue a Certificate of Identity to one claiming to be an American citizen.

The pleadings clearly showing, in fact the complaint alleging, that appellee *had not been denied a travel document*, deprived the district court of jurisdiction and our motion to dismiss should have been granted.

On our second assignment of error it is clear that an application to the district court for an order to show cause directed to the Secretary of State and requiring him to issue a travel document is in the nature of mandamus. District courts of the United States are not clothed with power to issue such writs.

It is our position that the district court is without jurisdiction over the person of the defendant, Secretary of State, and is without power, on a mere order to show cause why travel documents should not be issued, to order the Secretary of State to issue such a travel document. This position is fortified by the very recent decision of Judge Goodman, United States District Judge for the Northern District of California, Southern Division, in the case of *Yee Gwing Mee, Guardian Ad Litem for Yee Yook Baw, et al v. Acheson*, being cause No. 30994, in which Judge Goodman stated:

> "The main and vital issue is whether the court has power, in a proceeding under Section 903, to order the Secretary of State to issue a certificate of identity to plaintiff in such action. Plaintiff contends that the court has what he denotes as 'ancilliary' power, in a proceeding under §903, in aid of the proceeding, to issue the order requested. In effect, he urges that in any case brought pursuant to §903, plaintiff is entitled to receive a certificate of identity and hence that in every case of denial by the Secretary of

State, the court has power to issue and the petitioner should receive an order as requested. The defendant contends that neither by §903, or otherwise, is such power or jurisdiction vested in a United States District Court.

"The order sought is in the nature of mandamus. No power is vested in a United States District Court under §903 to issue the order requested. To the contrary, §903 provides that a person outside the United States, who files an action claiming citizenship, *may*, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a *diplomatic or consular officer* of the United States * * * a certificate of identity * * *. The statute further provides that the applicant may appeal to the Secretary of State from a denial by the consular officer of the certificate, and that the Secretary, if he affirms the denial, must state his reasons therefor in writing.

"The statute also authorizes the Secretary of State, with the approval of the Attorney General, to prescribe rules and regulations for the issuance of certificates of identity. Such regulations have been issued. 22 C.F.R. 50.18, 50.29. The only restriction the statute imposes upon the Secretary is that he may not deny a certificate *solely* on the ground that the applicant 'has lost a status previously had or acquired as a national of the United States.'

"We therefore look in vain, *within* the statute, for any power there vested in a United States Court to direct the issuance of a certificate. Whenever Congress has decided to authorize United States Courts to issue orders or make judgments in connection with administrative proceedings, it has specifically provided there-

for by statute.[1] To construe this statute, as argued by plaintiff, would render illusory and nugatory, the power therein vested in the Secretary of State. For it would make the statute read to the effect that a certificate of identity must, ipso facto, issue in any case where a §903 complaint is filed.

"We must look elsewhere, then, to find the power, which plaintiff is pleased to call 'anciliary'. But when we do so, we run headlong into a stone wall, to-wit, the prohibition that prevents courts from compelling performance, when refused, of a non-ministerial duty by an executive officer of the government. *Marbury v. Madison*, 5 U.S. 137, 168 (1803); *Linklator v. Perkins*, 74 F. (2d) 473, (App. D.C. 1934); *United States ex rel. Alaska Smokeless Coal Co. v. Lans*, 250 U.S. 549 (1919).

"It is true that there is authority to compel performance when refused, of a ministerial duty. Also a Federal Court can, in some instances, compel action in matters involving judgment and discretion, but then only to compel an officer to take action one way or another, but not to direct the exercise of judgment or discretion in a particular way, *Wilbur v. U.S.* 281 U.S. 206, at 218.

"The record shows that the American Consul in Hong Kong had evidence before him which

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[1]For example, see Review of disallowance of debt claim by Alien Property Custodian, 50 U.S.C. App. §34. Review of orders of the Securities and Exchange Commission, 15 U.S.C. §771. Review of farm marketing quotas, 7 U.S.C. §1366. Review of orders of Secretary of Agriculture under Packers and Stockyards Act. 7 U.S.C. §194. Review of arbitration award under Railway Labor Act, 45 U.S.C. §159.

called for the exercise of discretionary judgment on his part as to the identity of the applicant for the certificate of identification. §903, by its very terms, confers discretionary power upon American consular officers and upon the Secretary of State in the issuance of Certificates of Identity. There is, by the statute, vested in consular officers and the Secretary of State, the power to determine whether or not the showing made by an applicant for a Certificate of Identity is 'in good faith' and 'has a substantial basis'. The plain language of §903 conclusively negates any claim that the function of the Secretary of State is ministerial.

"There is no authority in law anywhere discoverable, which vests in this court the power or jurisdiction to make a determination which, by this statute, is exclusively vested in the Secretary of State and consular officers of the United States. To grant the order prayed for would be in effect a determination by this court, irrespective of the determination of the Secretary of State, and as a judicial matter, the very subject matter committed by the statute to the decision of the executive branch of the government. This would be an unwarranted and unconstitutional exercise of power by the courts. We should be mindful always of Chief Justice Marshall's statement to the effect that courts should be equally circumspect in assuming jurisdiction where it is not vested as to refuse to exercise power where it exists. *Bank of United States v. Deveaux*, 90 U.S. 85 (1809).

"Nothing in §903 warrants the conclusion that a petitioner availing himself of this statute has a right to be present in the United States to prosecute his litigation. See *U. S. ex rel Leung v. Shaughnessy*, D.C. S.D. N.Y. 1950, 88 Fed. Supp., 91, at 93. *Kawaguchi v. Acheson*, 9 Cir.

184 F. (2d) 310 (1950), cited by petitioner, does no more than hold that a petitioner in an action under §903 shall not be compelled, over his ob-objection, to proceed to trial in such action while he is abroad.

"Petitioner has called attention to an unreported decision of Judge Driver, of the Eastern District of Washington, in *Lee Tin Loy v. Acheson*, No. 1018, on July 9, 1952, wherein Judge Driver stated his belief that the court has the power to issue an order of the kind sought here. The facts in the *Lee Tin Loy* case are not before me. But it appears from a statement in the oral opinion quoted, that Judge Driver was acting under the assumption that the act of the Secretary of State, in denying a Certificate of Identity in the cited case, was a ministerial act and hence the court had power to direct him to perform it. I must respectfully differ, inasmuch as I am of the opinion that the power conferred upon the Secretary of State under §903 is not ministerial in character.

"It is argued that the defendant, by foreclosing the right to travel documents, may defeat the very litigation directed against him. If the denial of the certificate has that effect, then the remedy is by legislation.

"There is no way of knowing before trial, whether the presence of petitioner is indeed necessary. It may well be that at trial, if the presence of petitioner proves to be necessary, the court may, pursuant to its inherent power in that regard, order the defendant to cause the production of plaintiff *as a witness*. But that is not necessary now to decide. If the power to do so does exist, it could not, of course, be exercised except upon a proper showing. Certainly no showing is made here as to any need for the pres-

ence of this child plaintiff in order to determine the litigation. Indeed, it is difficult to see how he could give any pertinent evidence as to his own birth or parentage or identity. The suspicion is not wholly unwarranted that the main object of the proceeding is to get the child into the United States irrespective of the merits of his claim of nationality.

"Being of the view that this court has no power in a proceeding under §903 to issue the order sought, the petition for such order should be and is denied.

"Dated: September 5, 1952.

LOUIS E. GOODMAN
United States District Judge."

In the very recent case of *Soon Lock Kee and Soon Moon Kow, as Guardian ad Litem for Soon Jick Kuey v. Acheson,* Civil No. 30469, Judge Carter, United States District Judge for the Northern District of California, Southern Division, made a similar holding.

THE SECRETARY OF STATE IS NOT AUTHORIZED TO ISSUE TRAVEL DOCUMENTS UNDER SECTION 903

The statute (§903, T. 8 U.S.C.) with respect to a "Certificate of Identity" expressly provides:

"* * * If such person is outside the United States and *shall have instituted such an action* in court, *he may, upon submission of a sworn application* showing that the claim of nationality presented

in such action is made in good faith and has a substantial basis, *obtain from a diplomatic or consular officer* of the United States *in the foreign country in which he is residing* a Certificate of Identity *stating that his nationality status is pending before the Court*, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. * * *"

The Section further provides for an appeal from the consul's decision to the Secretary of State.

Clearly, the statute above quoted refers to travel documents applied for *after the institution* of the action authorized to be commenced in the United States by one claiming American nationality while abroad, and *not applications filed before.*

In this case, it clearly appears that the action is premature because, in the very nature of things, there is no allegation in the complaint that *after the institution of the action any application whatever*, to the only person *authorized* to issue a travel document *has been made or refused.*

The order issued by the District Court, requiring the *Secretary of State to issue a travel document is void* because, we say without fear of successful contradiction, that there is no duty imposed upon the Secretary of State or any authority in law authoriz-

ing him to do the thing the order of the district court requires him to do. That duty, by express provisions of law, *is to be performed by the American Consul* within the foreign country where the applicant resides, and *then only after the institution of the suit* which is authorized by the statute *to enable the plaintiff to come to the United States to prosecute his action.*

The refusal of the Consul to issue the travel documents *a long time prior to the commencement of the suit* here involved, in the very nature of things cannot be considered a *refusal of the travel document which would permit the plaintiffs to come to the United States to prosecute actions that did not then exist.*

On the third assignment of error we submit that our argument on the second assignment is applicable.

On our fourth assignment of error we earnestly urge that there was absolutely no competent evidence of *identity.* True as to the birth there was evidence, but it was all hearsay, except for a photograph taken in China many years ago *no one identified the child alleged to have been born as the same individual referred to as being the person whose application for a travel document had not been acted upon* by the consulate in China, and the court did not see the in-

dividual referred to by any of the witnesses. A blood grouping test, denied by the district court, could and would, we believe, have shown whether the alleged father's blood typed with that of the alleged son. If it did not, such blood grouping test would have definitely proven fraud.

Where the claim of American citizenship is founded upon paternity rather than birth in the United States, such paternity and/or identity must be established by documentary or such other *clear* and *convincing evidence* sufficient to satisfy the court of the bona fides of appellee's claim.

Appellee's identity and paternity is controverted. A physical examination, including the taking of blood tests may have important probative value to the court in determining this issue, and we submit, that the district court abused its discretion in refusing to order such test.

Authority for such an order is found in Rule 35, Federal Rules of Civil Procedure.

Federal Judicial Code, 28 U.S.C. 723 (b) provides:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the District Courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil

actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

"They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." (June 19, 1934)

Rule 35 of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, reads:

"*Physical and mental examinations of persons.*
(a) Order for examination.

In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and all other parties and shall specify the time, place, manner, and conditions, and scope of the examination and the person or persons by whom it is to be made."

This rule is completely in harmony with the spirit and purpose of the new procedure to bring into the light all of the available evidence on the issues without regard to any tradition superstition that any party has a proprietory right to conceal or withhold it.

Rule 35 is necessarily valid because adopted by the Supreme Court and because Congress took no affirmative action against it when, pursuant to the

requirement of the Enabling Act, the rules as a whole were submitted to Congress.

In *Siblach v. Wilson & Co.*, 312 U.S. 1 (1940) 7th Cir. the Supreme Court upheld the view that Rule 35 had been validly adopted in full conformity with the Enabling Act, *supra*, that it related to a matter properly classified and regulated as "procedure", violated no substantive right of the plaintiff in a civil action for damages for personal injuries contrary to the prohibition contained in that act, and was controlling in its field, settling the procedure to be followed by all Federal Courts, regardless of the provisions of State laws or the views of State decisions.

In *Contee v. United States* (1940) 112 F. (2d) 447 an action on a War Risk Insurance policy the court held that the granting by the Federal District Court of a petition for a physical examination of the plaintiff, under the authority of Rule 35(a) violated no substantive rights of privacy and infringed upon no constitutional right.

Rule 35 was upheld and the conclusion reached that the adoption and application of the rule is a proper exercise of the power of the court under the act.

Kelleher v. Cohoes Trucking Co. (1938) N.Y. 25 F. Supp. 965;

Wadlow v. Humberd, 1939, N.Y. 27 F. Supp. 210;

The Italia, 1939, 27 F. Supp. 785;

Strasser v. Prudential Ins. Co., 1939, 1 F.R.D. 125.

In *Leach v. Grief Bros.*, D.C. Miss. 1942, 2 F. R. D. 444, the court held that this rule superseded Mississippi law under which court is without power to compel party to submit to physical examination.

In *Beach v. Beach*, 114 F. (2d) 479, (D.C.) an action by an infant and wife for maintenance wherein the husband counterclaimed for divorce on the ground of adultery, the court approved the blood grouping test.

Judge Edgerton delivering the opinion of the court in which Judge Rutledge concurred, held that Rule 35(a) related "exclusively to the obtaining of evidence, and was therefore procedural" and as such neither infringed substantive rights nor was confined in its scope to action for damages for personal injuries and that it was properly applied in an action for maintenance by an infant and wife against her husband who counterclaimed for divorce on the ground of adultery, pending which a child was born to the plaintiff, as empowering the court to make an order requiring the plaintiff and child to submit to a blood

grouping test for the purpose of comparison of their blood with the blood of the defendant, the result of said test being considered as bearing upon a "physical condition" within the contemplation of the statute and both wife and child being regarded as "parties" whose physical conditions were in controversy, within the meaning of the rule.

The court further stated:

> "It remains to consider whether the physical condition of a party is in controversy * * * Clearly the characteristics of one's blood which are expressed in terms of red and white corpuscles or of haemoglobin are parts of one's 'physical condition'. We think that the characteristics which are expressed in terms of blood grouping are likewise part of physical condition * * *. Appellee offers his denial of paternity in support of his demand for blood tests. He thereby asserts, by necessary implication that the blood groupings of appellant and her child are or may be inconsistent with his paternity. Appellant, on the other hand, asserts appellee's paternity and thereby denies, by necessary implication, that the blood groupings are in controversy within the meaning of Rule 35(a)."

In the case at bar, no identity documentary evidence was introduced. Appellee is relying on his alleged father's self-serving statement concerning the relationship — no old letters, old photographs, evidence of remittances to the applicant, insurance policies in which the appellee is named as beneficiary,

income tax returns in which appellee is named as a dependent or any other evidence of documentary identity showing that a filial relationship has existed over a period of years and is not merely a recent invention.

Appellee has asserted a claim to American citizenship — waiting until he has reached the age of 26 years, and the burden is upon him to show by reasonable evidence that his claim is valid.

While counsel for appellee made no objection to our demand for a blood grouping test it is and always has been his position in the many Chinese cases he has handled that he opposes most vigorously such motions.

In *Mann v. Venetian Blind Co.*, 111 F. (2d) 455, affirming 21 F. Supp. 913, the court held that where there is material testimony which would establish a fact in issue, and a litigant fails to present it, though it is in his present ability to do so, and fails to offer a reasonable excuse for his failure, the presumption follows that the testimony, if presented would be against the litigant. See also *Bowles v. Lentin* 151 F. (2d) 615, cert. den.; *Lentin v. Porter*, 327 U.S. 805, rehearing denied, 328 U.S. 877, and *Raiche v. Standard Oil Co.*, 137 F. (2d) 446.

In *National Relations Board v. Ohio Calcium Co.*, 133 F. (2d) 721, the court held that where the party having the burden of proof as to a particular fact has the evidence within his control and withholds it, the presumption is that such evidence is against his interest.

In connection with the experience in these Chinese cases in California, the decision of Judge Westover of the Southern District of California, Central Division, in the case of *Mar Gong v. McGranery*, 109 F. Supp. 821, is indeed enlightening. Judge Goodman of the Northern District of California has also written an instructive opinion in the case of *Ly Shew as Guardian Ad Litem for Ly Moon v. Acheson*, 110 F. Supp. 50.

It follows, therefore that the district court in this case, erred in entering the decree declaring appellee to be an American citizen and its decree should be reversed.

CONCLUSION

As so truly said by Judge Goodman in his opinion:

> "As to the paternity of plaintiffs, the government did not and obviously could not present any

evidence. For the area within Communist China, wherein plaintiffs claim to have been born and wherein the alleged mother is said to be, and wherein plaintiffs claim to have lived their entire lives, has long been closed to any opportunity for investigation or verification. Thus the only recourse of the defense was to cross-examine the witnesses.

Judge Goodman, a veteran jurist of wide experience in these Chinese citizenship cases has attempted to establish an adequate legal yardstick with which to measure the evidence. He has given an elaborate background from his many years of experience, dealt with the legislative history of the Act, holding that evidence must be clear.

In *Wong Ying Loon v. Carr* (9 Cir.) 108 F. (2d) 91, this court has definitely held the burden to be on the applicant to prove his American nationality.

In his opinion Judge Goodman said:

"Plaintiffs claim that they have made a prima facie case, *that the burden of going forward consequently shifted to the defense*, that since the defense presented no evidence, it failed to carry its burden, ergo, judgment should go for plaintiffs." *(This is precisely* what Judge Lindberg in effect held.) (Italics ours)

Said Judge Goodman:

"Such reasoning begs the question as to what constitutes a prima facie case in this sort of pro-

ceeding whether or not the showing made is prima facie depends upon the nature and extent of the burden of proof.

"The burden of proof resting upon plaintiffs is to show that *they are the persons who, because of their identity, are entitled to be judicially declared to be American citizens.*

"This brings us to a consideration of what degree of proof is necessary in order to establish their identity.

"Constitutionally, only those born or naturalized in the United States and subject to the jurisdiction thereof, are citizens. Const. Amdt XIV. The power to fix and determine the rules of naturalization is vested in the Congress. Const. Art. I, Sec. 8 Cl. 4.

"Since all persons born outside of the United States, are foreigners. *Boyd v. Nebraska ex rel Thayer,* 143 U.S. 135; *U. S. v. Harbanuk,* 1, Cir. 62 F. (2d) 759, 761 and not subject to the United States statutes, such as Section 1993 and 8 U.S.C. 601 derive their validity from naturalization power of the Congress, *Elk v. Wilkins,* 112 U.S. 94, 101; *Wong Kim Ark v. U. S.* 169 U.S. 649, 702 (1898). Persons in whom citizenship is vested by such statutes are naturalized citizens and not native born citizens. *Zimmer v. Acheson,* 191 F. (2d) 209, 211 (10 Cir. 1951), *Wong Kim Ark v. U. S. Supra.* While under Section 903, the courts are not granted the jurisdiction to 'admit' to citizenship, as under the naturalization statutes, the jurisdiction to 'declare' citizenship by naturalization pursuant to Section 903 is substantially equivalent. This is so because under Section 903 a decree favorable to petitioner in effect — makes petitioner a citizen, whereas an unfavorable decree requires deportation to the foreign land of birth.

"Consequently, in my opinion, a decree *declaring* citizenship by naturalization is in all respects the same as a decree *admitting* to citizenship. Indeed, the consequences of denying the prayer of petitioners here are much more dire than those resulting from denying petitioners for naturalization, for in the latter case the petitioners may remain, in most cases, in the United States, while in the former, the result is deportation. *The degree of proof therefore, required of plaintiffs, should be of substantive parity with that required of petitioners for naturalization.* (Italics ours)

"It has been the rule in naturalization cases that an applicant for citizenship has the burden of convincing the court by satisfactory evidence that he is entitled to citizenship *U. S. v. Schwimmer*, 279 U.S. 644, 649 (1929); *Tutun v. U. S.* 270 U.S. 568, 578 (1926); *U. S. v. McIntosh*, 283 U.S. 605 (1931); In re Laws, 59 F. Supp. 179. *And the burden never shifts to the government. U. S. v. Schwimmer*, supra; *Tutun v. U. S.* supra; *U. S. v. McIntosh*, supra."

The evidence in this case certainly does not meet the standard set out in Judge Goodman's opinion, which shows a scholarly, careful study and a painstaking dissertation.

Here we have nothing but hearsay evidence of the most unreliable variety.

Judge Goodman further said:

"A judgment declaratory of the American citizenship of a person who has grown up in an

alien culture and whose only claim to citizenship is based on heredity vitally affects the American people. All the rights and privileges of citizenship would be thereby vested in a person totally unprepared to exercise them. Both the temptation and the opportunity for fraud is great in these cases. American citizenship is indeed a prize for those persons seeking to escape the misery of communist China. A plausible claim is easily presented and virtually impossible for the government to meet. The standard of clear and convincing proof, I hold, should be applied in all cases where an applicant *invokes the judicial power* to affirm a claimed right of United States citizenship by naturalization. It should be applied in these Section 903 cases."

Here, we have a man 26 years of age, who has always lived and still lives in China, wholly unprepared to take up the duties of citizenship, who may or may not be the son of Lee Kut,where a blood grouping test may or may not prove his identity as the son of this alleged father, yet the alleged father is unwilling to submit to that test, which it would seem under all of the circumstances in the interest of justice the district court should have ordered.

In the American Medical Journal of June 14, 1952, at page 699 will be found the following instructive table on blood grouping:

"*Blood groups in parents and children with ten possible matings.*

Blood Groups of Parents	Possible Blood Groups in Children	Blood Groups Not Possible in Children
OXO	O	A, B, AB
OXA	O, A	B, AB
AXA	O, A	B, AB
OXB	O, B	A, AB
BXB	O, B	A, AB
AXB	O,A,B,AB	NONE
O X AB	A, B	O, AB
A X AB	A, B, AB	O
B X AB	A, B, AB	O
AB X AB	A, B, AB	O

It hardly seems reasonable that a legitimate father would refuse to consent to a blood grouping test with that of his son unless he were fearful that the test might disprove his claim.

It is respectfully submitted that the court erred in denying our motion to dismiss on the jurisdictional ground; erred in ordering the Secretary of State to issue a travel document before the Consul had completed his investigation; erred in refusing a stay of that order; erred in finding the evidence sufficient to establish American citizenship and in entering its decree declaring appellee an American citizen and its decree should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

APPENDIX "A"

No. 30159

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNA, SOUTHERN DIVISION

LY SHEW, as guardian ad litem of LY MOON, a minor,

Plaintiff,

vs.

THE HONORABLE DEAN ACHESON, as Secretary of State of the United States,

Defendant.

ORDER GRANTING MOTION FOR PHYSICAL EXAMINATION

The defendant having moved, pursuant to Rule 35 of the Federal Rules of Civil Procedure, for an order directing the plaintiff herein and his alleged father to sumbit to a physical examination, including blood grouping tests, and it appearing to the Court that such tests, if made under proper conditions by persons competent to make and evaluate such tests, may have probative value to disprove, but not to prove paternity and thus may be admissible on a trial on the merits if the trial court should find that the question of paternity is legally in issue, and it further appearing to the Court that such blood grouping tests

may properly be ordered under said Rule 35 (see *Beach v. Beach)*, it is by the court

ORDERED that the defendant's said motion for an order directing the plaintiff herein and his alleged father to submit to a physical examination, including blood grouping tests, be and the same hereby is GRANTED and defendant is directed to prepare an order in conformance with the provisions of said Rule 35.

Date: August 27, 1952.

MICHAEL J. ROCHE
Chief United States District Judge